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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM CHARLES LAMLIN, Defendant and Appellant.	A093827 (Sonoma County Super. Ct. No. SCR29632)

A jury found defendant William Charles Lamlin guilty as charged of committing two lewd and lascivious acts by force against a child under the age of 14 (Pen. Code, § 288, subd. (b)(1)).[1] The jury found defendant not guilty of the additional charge of misdemeanor battery, but guilty of the lesser included charge of misdemeanor assault (§ 240) on a different child. After the trial court sentenced him to state prison for an aggregate term of six years, defendant perfected this timely appeal.

We conclude that the trial court did not abuse its discretion in permitting the victim to testify while seated on the lap of her father, whom the court had accepted as the victim's "support person" as authorized by section 868.5. We further conclude that this procedure, although unorthodox, did not, in the circumstances of this case, result in prejudice to defendant.

BACKGROUND

The essential facts are easily recounted. S., who at all relevant times was 11 years of age, was standing in a store check-out line to buy candy with her friend J. (who was

[1] All further statutory references are to the Penal Code unless otherwise indicated.

nine). Defendant was in the line ahead of them, holding a large bottle of beer. Defendant asked J. to buy the beer, and then grabbed J.'s leg and told him "don't steal that candy." J. thought defendant was "acting weird" and "kind of goofy." J. completed his purchase of ice cream and left the store. S. thought defendant was "scary" and "act[ing] funny," as if he had been drinking. S. had paid for her candy and was leaving the store when defendant grabbed her bottom with both hands and squeezed. He then moved one of his arms between her legs and squeezed her crotch area with his hand. Then he "wiggled" his hand and lifted her off the ground. S. began screaming and kicking. She could not recall how she got free of defendant.

Once outside the store, S. rejoined J., who thought she seemed scared. Actually, S. was mad because J. had left her in the store. After telling J. that defendant had grabbed her, S. and J. ran home. By the time she reached home and her father, S. was crying; her father testified that she was "[h]ysterically upset." She told her father that "a man just grabbed me." S.'s father summoned police as he drove to the market. Once at the store, and with police, S. described what defendant had done. Later that night, S. began complaining of neck pain; the next day she went to a hospital and came home wearing a neck brace. S. wore the brace for about a week, and missed several days of school.

A police officer who spoke to defendant on the night of the alleged assaults testified that defendant smelled of alcohol and "had obviously been drinking," but he did not appear intoxicated. Defendant told the officer that he did grab J.'s leg "but only in a playful way." Defendant denied any contact with S. The officer spoke to defendant at a location known to be frequented by "transients and people passing through drinking . . . ." S. and J. were brought to the location, where both of them identified defendant.

For the defense, the market cashier testified that he observed nothing inappropriate between defendant and the children. Defendant did not testify. The theory of the defense argued to the jury was consistent with defendant's statement to the officer—defendant did touch J., but only innocently, and he did not touch S. at all.

REVIEW

I

The claim of error to which defendant devotes primary emphasis in his brief is the manner in which S. was allowed to testify by both the magistrate conducting his preliminary examination and the judge presiding at his trial. S. was allowed to testify while sitting on her father's lap. Defendant has a number of arguments as to why this unorthodox procedure went beyond the scope of section 868.5, which provides that a "prosecuting witness in a case involving a violation" of a number of specified offenses "shall be entitled, for support, to the attendance of up to two persons of his or her own choosing . . . at the preliminary hearing and at the trial . . . during the testimony of the prosecuting witness."

Defendant's first arguments concern claimed defects of procedure. He notes that the special procedures authorized by section 868.8 that go beyond those of 868.5 are restricted to children *under* the age of 11, whereas S. was already 11. The argument has not been preserved for appeal because no objection on this ground was interposed at the trial. (Evid. Code, § 353, subd (a); *People v. Cudjo* (1993) 6 Cal.4th 585, 621-622.)

"In *People v. Adams* (1993) 19 Cal.App.4th 412 [], the court rejected a constitutional challenge to California's support person statute, but held there must be a case-specific showing of necessity for support via an evidentiary hearing. The court found this necessity requirement in *Coy v. Iowa* (1988) 487 U.S. 1012 . . . , which required individualized findings of necessity to justify child testimony from behind a screen, and *Maryland v. Craig* (1990) 497 U.S. 836 . . . , which required an evidentiary hearing to determine whether child testimony on one-way closed circuit television was necessary to protect the child." (*People v. Lord* (1994) 30 Cal.App.4th 1718, 1721.) Defendant complains that no such hearing was held in this case. At the start of defendant's trial, while discussing in limine motions, his counsel was asked by the court "you don't object to her [i.e., S.] having a support person up here, do you?" Counsel replied: "I don't, except for the fact at the preliminary hearing . . . she sat on her father's lap . . . . I don't think that would be appropriate." Counsel's statement can be interpreted

as either a failure to demand a hearing or a concession that it was unnecessary. Either interpretation amounts to a failure to object, which means that the issue has not been preserved for appeal. (*People v. Lord*, *supra*, at p. 1722.)

Defendant argues that a child witness testifying while perched on an adult's lap will distract the jury's attention and thus diminish the jury's ability to assess the witness's demeanor and credibility. She cites the following quote from *People v. Adams* (1993) 19 Cal.App.4th 412, 439: "Even the most self-effacing person receives some attention by merely being present. In the audience, the support person can be invisible to the jury. On the stand, the support person's presence is inescapable. It cannot help but distract the jury's attention from the witness and keep the jury's attention divided while both persons are at the stand. The support person's presence dilutes the jury's concentration on the witness. The support person's demeanor, as unavailable to a reviewing court as a witness's demeanor, can influence the jury in its assessment of the witness's credibility. It can thus bolster the witness's credibility and operate as unsworn opinion evidence of the truth of the charges. Finally, the support person's presence invites speculation." Defendant argues that "Naturally, when the complaining witness sits in the support person's lap, all of the foregoing problems are exacerbated."

Defendant continues in his brief: "In the circumstances of the instant case, there was also more specific and particularized prejudice flowing from the court's decision that allowed S[.] to testify from her father's lap over Appellant's objection. As can be seen from videotape Exhibit 11,[2] S[.] is quite a large and mature-looking girl, who undoubtedly looked peculiar in her father's lap. The only inference the jury could draw . . . was that S[.] had been severely damaged and traumatized by the . . . incident, and had now regressed to a point where she needed to sit in her father's lap. Thus, the lap-sitting constituted a kind of irrelevant, improper, and highly inflammatory evidence. [Citation.] [¶] Moreover, allowing the jury to observe the tender demeanor which father and daughter undoubtedly displayed toward one another on the witness stand was also

[2] This exhibit recorded S.'s interview with a sexual abuse counselor. It was shown to the jury in redacted form.

prejudicial to Appellant in a number of ways. To the extent that S[.]'s father comforted her on the witness stand, the jury would infer that S[.] required comforting because the events she complained of actually occurred and harmed her. . . . What is more, S[.] was more likely to break down on the stand both because her position infantalized her and because her father was on the stand to comfort her. [¶] Additionally, and more simply, the tender familial scenario of S[.] seated in her father's lap was prejudicial because it humanized them both and aroused juror sympathy. . . . [¶] The sympathy-related prejudice in this case was doubled because the tender father/daughter relationship displayed for the jury portrayed not only S[.], but also her father, in a sympathetic light." (Fns. omitted.)

There is much in defendant's argument to ponder. However, virtually all of it (1) has been rejected by the vast majority of courts around the country; (2) relates to policy arguments which were resolved by the Legislature when it enacted section 868.5; and (3) cannot be substantiated by the record on appeal.

The sole authority cited by defendant that is directly pertinent is *State v. Rulona* (Hawaii 1990) 785 P.2d 615, which involved an eight-year-old sexual assault victim testifying while sitting on the lap of a sexual abuse counselor. With respect to "the question of whether there might be circumstances in which a court could permit a child witness to testify sitting in the lap of an accompanying person," the court stated: "Even if we assume that the court had the discretion to do so, there is nothing in the minor witness' testimony, either before the court made its [] ruling, or after she took the stand before the jury, which shows a compelling necessity for allowing such a prejudicial scenario. On the contrary, the record shows that the child apparently testified before the grand jury without needing to be seated on the lap of a sexual abuse counselor. Her testimony in sum was that she was frightened to be there as a witness, and would feel better if she sat on the sexual abuse counselor's lap. Most witnesses appearing in trial for the first time, even adults, are frightened, but there was no indication that she could not testify without being seated in the counselor's lap." (*Id*. at p. 617.)

Rulona is factually distinguishable because it treated the absence of a particularized showing of necessity for the procedure as reversible error. As shown above, although subdivision (b) of section 868.5 contemplates such a showing, and while it may clearly be the better practice (see *People v. Adams*, *supra*, 19 Cal.App.4th 412, 443-444; *People v. Patten* (1992) 9 Cal.App.4th 1718, 1727-1728; *People v. Kabonic* (1986) 177 Cal.App.3d 487),[3] its absence is not—as in *Rulona*—accepted as prejudicial per se; because it is a safeguard for the defendant, it may be waived by the defendant. (*People v. Lord*, *supra*, 30 Cal.App.4th 1718, 1722.) Moreover, here S. did testify at the preliminary examination on her father's lap, and what occurred at that proceeding undoubtedly figured in defense counsel's decision not to contest the necessity for a support person to accompany S. on the stand.

An additional impediment to accepting *Rulona* is that it stands alone against the weight of authority from other states which allow minor witnesses to testify while sitting on the lap of a parent, foster parent, or relative. (*Murchison v. State* (Ga.App. 1998) 500 S.E.2d 651; *State v. Reeves* (N.C. 1994) 448 S.E.2d 802; *State v. Johnson* (Ohio App. 1986) 528 N.E.2d 567; *State v. Dompier* (Or.App. 1988) 764 P.2d 979; *Com. v. Pankraz* (Pa.Super. 1989) 554 A.2d 974; *State v. Jones* (W.Va. 1987) 362 S.E.2d 330; *State v. Shanks* (Wis.App. 2002) 644 N.W.2d 275; *Simmers v. State* (Wyo. 1997) 943 P.2d 1189; cf. *Davis v. State* (Fla.App. 1972) 264 So.2d 31 [six-year-old witness testified on judge's lap during non-jury trial].) One state even allowed a minor to testify while seated on the *prosecutor's* lap. (*State v. Rogers* (Mont. 1984) 692 P.2d 2.) No less significant is the fact that Congress enacted legislation expressly authorizing some categories of minor victims of crime to testify while sitting on the lap of an "adult attendant." (18 U.S.C. § 3509(i).) *Rulona* is not so persuasive that it justifies cleaving away from this national consensus.

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[3] *Kabonic* is the only reported California decision where a child witness testified while sitting on an adult's lap—in that case, the child's mother—but the propriety or validity of this procedure was not discussed.

Rulona is correct in one respect. Appearing in a public courtroom is stressful, and this truism is even more apt for children. Reducing that stress is the purpose behind section 868.5. (See *People v. Adams*, *supra*, 19 Cal.App.4th 412, 442; *People v. Kabonic*, *supra*, 177 Cal.App.3d 487, 495.) The risk of jury empathy with underage victims of sexual crime and abuse is intrinsic and unavoidable so long as the victims are allowed to testify in criminal trials. Section 868.5 reflects a determination by the Legislature that such testimony is to be allowed, but not as a matter of course and with appropriate procedural safeguards to protect the accused's rights. Subdivision (c) requires a support person who is also a witness to testify before the victim or "prosecuting witness" whom the person will support. By this provision "the Legislature intended to guard against the possibility that the support person would tailor his or her testimony to match that of the complaining witness." (*Kabonic*, at p. 495.) Subdivision (b) specifies that "In all cases, the judge shall admonish the support person . . . to not prompt, sway, or influence the witness in any way."[4]

Without denigrating the concerns expressed by defendant, we believe that most of them are ultimately addressed to a forum other than a court of review. The policy arguments about whether minor crime victims should testify with the aid of a support person would be most properly directed at the Legislature when it was considering enacting section 868.5. Once the basic decision approving the practice was codified, the wisdom of the policy adopted by the Legislature could not be revisited by the courts. The actual application of the policy was then entrusted to the discretion of the trial court for resolution on a case-by-case basis. Accordingly, if defendant means to argue that the practice is a per se violation of the right of confrontation, or is inherently prejudicial to an accused's due process right to a fair trial, we join other courts in rejecting such an inflexible approach. (*People v. Johns* (1997) 56 Cal.App.4th 550, 554; *People v. Adams*, *supra*, 19 Cal.App.4th 412, 435-436; *People v. Patten*, *supra*, 9 Cal.App.4th 1718, 1725-1727.)

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[4] Both of these precautions were followed at defendant's trial. S.'s father was also admonished by the prosecutor.

The visual impact of S. sitting on her father's lap while testifying is not something that can be appreciated from the cold pages of an appellate record. For example, we have viewed the video mentioned in the trial court's ruling (see note 2 and accompanying text, *ante*), which provides some knowledge of S.'s size and appearance. There is, however, nothing in the record concerning her father's size and appearance. In other words, what S. looked like on her father's lap is a picture beyond our powers of review to imagine. The trial court, on the other hand, had S. and her father in the courtroom. We cannot evaluate whether, in defendant's words, S. looked "peculiar" sitting on her father's lap and was thus "infantalized" and unduly "humanized." These are particularized objections that should have been made to the trial court. Because they were not, they were not preserved for our review. (Evid. Code, § 353, subd. (a).)

Defendant's argument implicitly recognizes that the trial court's discretion is involved. His claim that what occurred was "a kind of irrelevant, improper, and highly inflammatory evidence" inevitably evokes the language of Evidence Code section 352, which is the fount of a trial court's evidentiary discretion. Defendant never asked the court to use its discretion to prevent S. testifying from her father's lap. "It is axiomatic that before a trial court may be found to have *abused* its discretion in failing to exclude otherwise admissible evidence, the record must affirmatively show that the court was requested to *exercise* its discretion in the first instance." (*People v. Quaintance* (1978) 86 Cal.App.3d 594, 599.) The record here does not so show.

The same is true for the remainder of defendant's claims. Defendant asserts that S. was "more likely to break down on the stand," but he cites no instance in the record where she actually did break down. He implies that the jury's sympathy was drawn to S.'s "tender demeanor" and her being "comforted" by her father. The latter would be contrary to the court's instruction to the father, and we cannot assume that the instruction was disregarded. (E.g., *Francis v. Franklin* (1985) 471 U.S. 307, 324, fn. 9; *People v. Osband* (1996) 13 Cal.4th 622, 714.) The former is, as defendant notes, the quintessential issue beyond a reviewing court's competence. Moreover, S.'s father had already testified and his belief in his daughter's story was evident. His empathy for his

daughter would be understandable and no surprise to the jury. (Cf. *People v. Johns*, *supra*, 56 Cal.App.4th 550, 555 ["the parent is saying, 'I am here to support my child,' and nothing more"]; *People v. Patten*, *supra*, 9 Cal.App.4th 1718, 1731 ["It is natural that a close family member will believe and be supportive of another family member while testifying."].)

In *People v. Kabonic*, *supra*, 177 Cal.App.3d 487, the court did not reverse when the child victim had testified with her mother at her side. The factors listed there are equally applicable here: "[A]ppellant's position is weakened by these points: (1) The failure to make the barest offer of proof in the trial court below regarding proposed evidence of the substantial risk of improper influence posed by Renee's mother; (2) the lack of any indication in the record that the presence of Renee's mother actually influenced or affected the content of Renee's testimony; (3) the fact the trial court did not, at any time during Renee's testimony, deem the presence of Renee's mother improper within the meaning of section 868.5; and (4) the failure of appellant to point to any evidence of improper influence in the record or otherwise to refer to any evidence on appeal which might support the position that the presence of Renee's mother posed a substantial risk, or in fact influenced or affected the content of Renee's testimony." (*Id.* at p. 498; accord, *People v. Patten*, *supra*, 9 Cal.App.4th 1718, 1728.)

There may be an additional factor. In *People v. Patten*, *supra*, 9 Cal.App.4th 1718, 1732, the reviewing court noted that "the defendant may make a tactical decision in some cases that he wants the victim-witness portrayed as an emotionally unstable or weak individual and might want the jury to clearly view the victim's reliance on a support person." If, as defendant now maintains, the image of S. sitting on her father's lap was so outlandish or bizarre, this may have been thought to work to defendant's advantage; it could bolster the defense theory of no contact whatsoever if the jury concluded that S. was not sufficiently convinced of her testimony that she could not give without her father's presence.

In light of the record before us, we have no basis for concluding either that the trial court's decision constituted error or prejudiced defendant in any significant sense.

II

S. also testified at the preliminary examination while sitting on her father's lap. Defendant contends that this procedure suffered from the same defects caused by the procedure being allowed at the trial; defendant also identifies certain additional objectionable features which did not reoccur at trial.

A motion to set aside the information pursuant to section 995 was the means by which defendant could raise issues related to the preliminary examination and the legality of his commitment prior to the commencement of trial. Defendant made such a motion, but on the sole ground that the evidence showed at best only a single violation of section 288, not the two charged in the information. The claims defendant now presents were not preserved for review. (§ 996; *People v. Anderson* (1987) 43 Cal.3d 1104, 1148; *People v. Phillips* (1985) 41 Cal.3d 29, 44.)

III

The statute defendant was convicted of violating makes it a felony for any person who "willfully and lewdly commits any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person . . . by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury . . . ." Defendant contends that the record contains insufficient evidence that he employed force on S.

The concept of "force" has undergone a measure of evolution over the past 20 or so years.

In *People v. Cicero* (1984) 157 Cal.App.3d 465, the defendant was convicted of two violations of the statute on this evidence: "Defendant . . . picked up the girls by the waist, one under each arm, and began to carry them along. As he did so, the girls slipped down and he moved his hands between their legs. While carrying the girls along in this fashion, defendant opened and closed his hands on the girls' crotches. Defendant carried the girls along for about 9 seconds, covering a distance of 15 to 20 feet." (*Id*. at p. 470.) After undertaking an exhaustive review of the statute's history, language, and purpose,

the court summarized its conclusions: "Where a defendant uses physical force to commit a lewd act upon a child under the age of 14, and the child suffers physical harm as a consequence, the defendant has committed a lewd act 'by use of force' under subdivision (b). Consent is no defense. Where no physical harm to the child has occurred, the prosecution has the burden of proving (1) that the defendant used physical force substantially different from or substantially in excess of that required for the lewd act and (2) that the lewd act was accomplished against the will of the victim. The prosecution may satisfy its burden on the latter issue by proving the physical force was such as would reasonably demonstrate that the lewd act was undertaken against the will of the victim under all circumstances, including the age and sizes of the defendant and the victim. The prosecution need not prove that the victim resisted the lewd act. Where no physical harm to the victim has occurred, it is an affirmative defense that the victim knowingly consented to the lewd act." (*Id*. at pp. 484-485.) The defendant's actions were then held to be sufficient to sustain his convictions. (*Id*. at pp. 485-486; accord, *People v. Quinones* (1988) 202 Cal.App.3d 1154, 1158 ["we believe the first part of the definition suggested in *Cicero*—'physical force substantially different from or substantially in excess of that required for the lewd act'—is sufficient."].)

In *People v. Schulz* (1992) 2 Cal.App.4th 999, the evidence showed that the defendant "awakened the victim by grabbing her arm, cornered her while she cried, held her arm, and touched her breasts and vaginal area." (*Id*. at p. 1004.) The court held that this showed duress, but not force: "As this court recognized in *People v. Quinones*[, *supra*,] (1998) 202 Cal.App.3d 1154 [], 'force' means ' "physical force substantially different from or substantially in excess of that required for the lewd act." ' [Citation.] We do not regard as constituting 'force' the evidence that defendant grabbed the victim's arm and held her while fondling her. [Citations.] The 'force' factor differentiates the charged sex crime from the ordinary sex crime. Since ordinary lewd touching often involves some additional physical contact, a modicum of holding and even restraining cannot be regarded as substantially different or excessive 'force.' " (*Ibid*.)

People v. Senior (1992) 3 Cal.App.4th 765, was decided by the same court that decided *Schulz*, and the expressed reasoning is nearly identical: "As this court recognized in *People v. Quinones*[, *supra*,] 202 Cal.App.3d 1154 [], 'force' means ' "physical force substantially different from or substantially in excess of that required for the lewd act." ' [Citation.] The jury here was so instructed. We agree there was insufficient evidence of this type of force used during any of the challenged counts, the oral-vaginal copulations in January (count four) and in August (count six), the oral-penile copulation in August (count five), and the digital-anal penetrations in August (count three) and in September (count seven). . . . [¶] We also do not regard as constituting 'force' the evidence that defendant pulled the victim back when she tried to pull away from the oral copulations in August. [Citations.] The 'force' factor differentiates the charged sex crime from the ordinary sex crime. Since ordinary oral copulation and digital penetration almost always involve some physical contact other than genital, a modicum of holding and even restraining cannot be regarded as substantially different or excessive 'force.' There was no evidence here of any struggle, however brief." (*Id*. at p. 774.)

The *Schulz-Senior* court came to the issue again in *People v. Gilbert* (1992) 5 Cal.App.4th 1372, where the court sustained a conviction described as follows: "[The victim] testified that Gilbert's forearm was over her mouth rendering her unable to cry out during the assault . . . and that in response to [the victim's] attempt to move, Gilbert pushed her back. It was not necessary to accomplishment of the described sexual acts that [the victim] be prevented from moving or from crying out. Gilbert's described acts therefore exceeded any force necessary to the acts. [¶] . . . We conclude the evidence was sufficient to support a finding, implicit in the jury's verdict, that Gilbert used force within the meaning of section 288, subdivision (b)." (*Id*. at p. 1381.)

People v. Babcock (1993) 14 Cal.App.4th 383, decided by Division Two of this District, involved a man convicted of forcibly molesting two children. The court stated: "This case is virtually indistinguishable from *People v. Pitmon* [1985] 170 Cal.App.3d 38. In *Pitmon*, the defendant grabbed the eight-year-old victim's hand, placed it on his

own genitals, and rubbed himself with the victim's hand. [Citation.] On appeal, the defendant argued there was insufficient evidence to sustain a finding of force. [Citation.] The court rejected this contention, holding '[t]here can be little doubt that defendant's manipulation of [the victim's] hand as a tool to rub his genitals was a use of physical force beyond that necessary to accomplish the lewd act. The facts show defendant had hold of [the victim's] hand throughout this act.' [Citation.] Similarly, in this case, the evidence demonstrates defendant grabbed Autumn's and Rachel's hands and forced them to touch his genitals. [¶] . . . [¶] We decline defendant's invitation to follow the dicta in *People v. Schulz, supra*, 2 Cal.App.4th 999, and *People v. Senior, supra*, 3 Cal.App.4th 765. In our view, the fatal flaw in defendant's argument, and in the analyses in *Schulz* and *Senior*, is in their improper attempt to merge the lewd acts and the force by which they were accomplished *as a matter of law.* Unlike the court in *Schulz*, we do not believe that holding a victim who was trying to escape in a corner is necessarily an element of the lewd act of touching her vagina and breasts. Unlike the court in *Senior*, we do not believe that pulling a victim back as she tried to get away is necessarily an element of oral copulation. And, unlike the defendant in this case, we do not believe that grabbing the victims' hands and overcoming the resistance of an eight-year-old child are necessarily elements of the lewd acts of touching defendant's crotch." (*Id*. at pp. 386, 388, fn. omitted.)

The court in *People v. Neel* (1993) 19 Cal.App.4th 1784 agreed with *Babcock* in declining to follow *Schulz* and *Senior*, adding the following to *Babcock*'s reasoning: "In our view, it is readily apparent that the force used in *Schulz* and *Senior* was applied to accomplish the lewd acts against the will of the victims and constituted physical force substantially different from and substantially in excess of that required for the lewd acts. A defendant may fondle a child's genitals without having to grab the child by the arm and hold the crying victim in order to accomplish the act. Likewise, an assailant may achieve oral copulation without having to grab the victim's head to prevent the victim from resisting. Simply stated, such force is different from and in excess of the type of force

which is used in accomplishing similar lewd acts with a victim's consent." (*Id*. at p. 1790.)

Finally, in *People v. Bolander* (1994) 23 Cal.App.4th 155, the same court which decided *Schulz* and *Senior* revisited the issue and repudiated the "dicta" in those decisions regarding the nature of "force" required for a violation of subdivision (b). "[I]n light of convincing criticisms set forth in *Babcock* and *Neel*, we respectfully disagree with the interpretation of the 'force' requirement of section 288, subdivision (b) discussed in *Schulz* and *Senior*. We instead join those courts which have held that '[i]n subdivision (b), the element of force . . . is intended as a requirement that the lewd act be undertaken without the consent of the victim. [Citation.] As used in that subdivision "force" means "physical force substantially different from or substantially greater than that necessary to accomplish the lewd act itself.". . .' Applying this standard to the facts at hand, we conclude that defendant's acts of overcoming the victim's resistance to having his pants pulled down, bending the victim over, and pulling the victim's waist towards him constitute force within the meaning of subdivision (b) 'in that defendant applied force in order to accomplish the lewd act[] without the victim's consent.' " (*Id*. at pp. 160-161.)

Citing Schulz, defendant argues that he "used *no force* distinct from the actions which themselves constituted the lewd acts." For the reasons set out in *Babcock*, *Neel*, and *Bolander*, we see no reason to resurrect the standard on which defendant's argument is predicated. The jury could treat the evidence as showing that defendant's initial touching of S.'s buttocks went beyond the tactile contact necessary for achieving sexual gratification. The grabbing could be construed as intended to hold S. in place and thus prevent her escape. As the courts in *Neel* and *Babcock* noted, grabbing or holding a victim is not necessary. (*People v. Neel*, *supra*, 19 Cal.App.4th 1784, 1790; *People v. Babcock*, *supra*, 14 Cal.App.4th 383, 388.) The same is even truer for the second count, when defendant lifted S. in the air with his arm between her legs and his hand upon her crotch. There is more than ample substantial evidence supporting the jury's twin conclusions that defendant used force in order to accomplish the lewd acts without the

victim's consent. (See, e.g., *People v. Bolander*, *supra*, 23 Cal.App.4th 155, 161; *People v. Neel*, *supra*, at p. 1790.)

IV

In discussing instructions, defendant's counsel advised the court that defendant was not asking for instruction on lesser included offenses, and would object to instruction on lesser offenses, but he noted that "the Court may have a . . . sua sponte duty" to do so. The trial court did not instruct on lesser-included offenses. Defendant now contends that this omission was error, and that the court had an independent duty to instruct on the lesser included offenses of lewd and lascivious acts committed without force, assault, and battery (§§ 288, subd. (a), 240, 242).

With respect to the first claimed omission, everything needed is found in *People v. Pitts* (1990) 223 Cal.App.3d 606: "In the instant case, the court and counsel discussed whether the court had a sua sponte duty, under the evidence presented, to instruct on section 288, subdivision (a) as a lesser included offense of section 288, subdivision (b). No defense counsel requested such an instruction, and the court accurately observed that none of them relied on a defense involving the commission of a violation of subdivision (a) as opposed to subdivision (b). Accordingly, the trial court found itself under no sua sponte duty to give the instruction. [¶] The court's ruling was correct, and the failure to give instructions on section 288, subdivision (a) was not error. All defendants denied taking part in any molestations. According to them, either they were misidentified or the crimes never actually occurred. If the People's evidence were believed, they were guilty as charged. If the defendants' evidence were believed, they were not guilty of anything. Under no view of the evidence was any of them guilty of nonforcible molestation pursuant to section 288, subdivision (a)." (*Id*. at pp. 883-884.) This reasoning is equally applicable to battery and assault. It should also be noted that because battery is a lesser-related offense, but not a lesser-included offense, there could be no sua sponte duty to instruct on it. (*People v. Santos* (1990) 222 Cal.App.3d 723, 738-739.)

V

As he was concluding his final closing argument, the prosecutor told the jury that S. had been "groped in her vagina." Defendant's final argument is that this brief reference constituted prejudicial misconduct. Because there was no objection to the comment and request that the jury be admonished to disregard it, this claim of error was not preserved for review. (E.g., *People v. Price* (1991) 1 Cal.4th 324, 447.) Even if the issue had been preserved, defendant would not prevail. S. testified that when defendant had his arm between her legs "[h]e squeezed me" with his hand around her vaginal area. When asked "when he had his hand there, was he moving it or holding it still?" S. answered "Moving it." When asked how defendant moved his hand she replied that he "[w]iggled it. To call that a "grope" was fair comment on the evidence and not misconduct. (E.g., *People v. Hill* (1998) 17 Cal.4th 800, 819; *People v. Williams* (1997) 16 Cal.4th 153, 221.)

The judgment of conviction is affirmed.

_____
Kay, P.J.

We concur:

_____
Reardon, J.

_____
Sepulveda, J.